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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JASON L. TAYLOR,
SERGEANT,
UNITED STATES MARINE CORPS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Military Rule of Evidence 504(c)(2)(A) bars either party from disclosing private marital communications unless the spouse asserting the privilege is accused of a crime against "the person or property" of the other spouse or a child of either spouse. The question presented is:

Whether the Court of Appeals for the Armed Forces erred when, in a trial for adultery, it ignored this Court's precedent in *Bassett v. United States*, 137 U.S. 496 (1890), and held that adultery is a crime against the "the person or property" of the other spouse for purposes of the marital communications privilege?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The principal opinion of the Court of Appeals for the Armed Forces is *United States v. Taylor,* 64 M.J. 416 (C.A.A.F. 2007). App. A, *infra,* at 1a. The principal opinion of the Navy-Marine Corps Court of Criminal Appeals is *United States v. Taylor,* 63 M.J. 236, 2006 CCA LEXIS 9 (N-M.C.C.A. 2006). App. B, *infra* at 21a.

JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on April 5, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Military Rule of Evidence 504(c)(2)(A), Manual For Courts-Martial, United States (2005 ed.), is reproduced in App. C, *infra* at 32a.

STATEMENT

In *Bassett v. United States*, this Court held upheld the common-law rule that "the wife is not competent [as a witness against her spouse], except in the cases of violence upon her person." *Bassett v. United States*, 137 U.S. 496, 505 (1890). The 1951 Manual for Courts-Martial provided for additional exceptions to the martial communications privilege in cases involving "injury" to the other spouse such as assault, "bigamy, polygamy, unlawful cohabitation, abandonment of wife or children for failure to support them, for using or transporting the wife for 'white slave' or other immoral purposes...." *United States v. Leach*, 7 U.S.C.M.A. 388 (C.M.A. 1956); Paragraph 148(e), Manual for Courts-Martial, United States (1951 ed.).

In 1965, the Court of Appeals for the Armed Forces (C.A.A.F.) found that this language departed from long-established common-law exceptions to the marital communications privilege in Federal courts and, because the drafters of the Manual intended to codify only the rule prevailing in the Federal courts, the language was not legally binding. *United States v. Massey*, 15 U.S.C.M.A. 274 (C.M.A. 1965). Two years later, in *United States v. Rener*, 17 U.S.C.M.A. 65 (C.M.A. 1967), the Court held that adultery was not a crime "injurious to the spouse" for purposes of the marital privilege. "[T]he proper approach to consideration of whether an offense charged against one spouse injures the other depends not upon the outrage to her sensibilities or a violation of the marital bonds, but upon some direct connection with her person or property." *Rener*, 17 U.S.C.M.A. at 68 (quoting *United States v. Massey*, 15 U.S.C.M.A. 274, 282 (C.M.A. 1965). Applying this test, the C.A.A.F. held that adultery was not an injury to the other spouse as contemplated by the marital privilege. *Rener*, 17 U.S.C.M.A. at 68.

In the 1969 edition of the Manual, the President narrowed the husband-wife privilege by eliminating the

privilege in courts-martial where the accused was charged with a crime against the child of either spouse. Paragraph 148(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969 ed.) The marital communications privilege was narrowed in order to protect, not only spouses, but also children who had been victimized by their parents. This change was consistent with changes to the privilege proposed by the Supreme Court in the then nascent Federal Rules of Evidence. *United States v. Menchaca*, 48 C.M.R. 538, 540 (C.M.A. 1974).

By amending the Manual, the President superseded the lower court's holding in *Massey*, which had interpreted the 1951 edition of the Manual, that incestuous carnal knowledge was not an injury to the spouse and thus not within the scope of the marital privilege. At the time *Massey* was decided in 1965, C.A.A.F. correctly noted that there had been no Federal cases holding, "the wife to be injured by her husband's carnal knowledge of their offspring." *Massey*, 15 U.S.C.M.A. at 280. In order to place these acts beyond the scope of the husband-wife privilege, the President had to amend the privilege itself, and he did so in the 1969 edition of the Manual. In *United States v. Menchaca*, C.A.A.F. explicitly overruled *Massey*, citing the President's change to the 1969 edition of the Manual as the basis for its decision. *Menchaca*, 48 C.M.R. at 540.

In 1980, the President again amended the Manual and established Military Rule of Evidence 504. Mil. R. Evid. 504(c)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1980 ed.). The broad language contained in Paragraph 148(e), which had exempted from the martial communications privilege all crimes "injurious to the spouse," was replaced with the common law exception involving crimes against the "the person or property of the other spouse or a child of either...." *Id.* The President also removed a list of specific offenses, including adultery, which had previously been listed as offenses "injurious" to the spouse in the 1969 Manual.

In this case, Sergeant Taylor asserted the marital communications privilege over a statement he made to his wife involving his marital infidelity, while the two were trying to salvage their marriage. The government sought to use the marital communication to prove the military crime of adultery. The lower court held that the Appellant's statements to his wife regarding his infidelity were not covered by the marital privilege because, "there is no evidence that, in adopting M.R.E. 504(c)(2)(A), the President meant to amend, let alone jettison, those exceptions to the privilege listed in paragraph 148(e) of the 1969 Manual." *United States v. Taylor*, 64 M.J. 416, 420 (C.A.A.F. 2007). Citing this Court's decision in *Trammel v. United States*, 445 U.S. 40, 50 (1980) for the principal that privileges be strictly construed, the Court held that adultery is a crime against the person or property of the other spouse. *Id.*

Judge Ryan dissented. "While a legislature can change the parameters of the 'ancient' marital privilege statute, the language of a statute 'should not be adjudged as working a departure from old and established rule, unless the language *imperatively demands such a construction*.' *Taylor*, 64 M.J. at 422, Ryan, J., dissenting (citing Bassett, 137 U.S. at 505-506). M.R.E. 504(c)(2)(A) does not include such language.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Armed Forces ignored this Court's holding in *Bassett v. United States* when it held that adultery was a crime against the person or property of the other spouse. *United States v. Taylor*, 64 M.J. 416 (C.A.A.F. 2007). As Justice Ryan correctly pointed out in her dissenting opinion, "Nonetheless, the Court, while ceding the anti-marital nature of such offenses, expressly rejected the notion that either polygamy or adultery was a crime that permitted an exception to the

marital privilege." *Taylor*, 64 M.J. at 20. While the majority in *Taylor* acknowledged Mil.R.Evid. 504's rooting in common law, and the fact that the 1980 Manual for Courts-Martial left out the previous laundry list of offenses excepted from the privilege, the Court held the President never intended to change the Rule by altering its language. The majority declared "[t]here is no evidence that, in adopting M.R.E. 504(c)(2)(A), the President meant to amend, let alone jettison, those exceptions to the privilege listed in paragraph 148.e. of the 1969 *Manual*. Rather, the Drafters' Analysis is strong evidence that he meant to apply the exceptions to both the husband-wife testimonial privilege and the marital communications privilege." Taylor, 64 M.J. at 15.

But the President did "jettison" those exceptions, and adopted new language that returned the Rule to the common law marital communications privilege at issue in *Bassett*. Adultery has not been a crime against the person or property of the other spouse in Federal courts for well over one hundred years. As noted by Judge Ryan in her dissenting opinion, such a departure from an established rule should be expressly made in the text of the Rule. Only this Court can address the lower court's departure from the established precedent of this Court and ensure that servicemembers are entitled to the same marital communications privilege available to civilians in Federal court.

I.

The Lower Court Has Decided the Important Question of Whether Military Rule of Evidence 504 Applies to the Crime of Adultery in a Way That Conflicts With the Relevant Decision of this Court.

In its opinion, the lower court addressed both the history of the confidential communications privilege and the martial privilege, noting that the two were "so intertwined as to require a discussion of both." *Taylor*, 64 M.J. at 5. At common law and in early American military law, the lower court noted that an exception to spousal disqualification existed when the trial was for bodily injury or violence inflicted by one spouse on the other. *Taylor*, 64 M.J. at 417. This was codified in 1951 in the Manual for Courts-Martial, yet confidential communications between husband and wife remained privileged. *Id.* at 8-9.

The court below went on to cite *United States v. Leach*, 7 C.M.A. 388 (1956), as a spousal privilege case in which it held that a wife was injured within the meaning of paragraph 148.e. by her husband's act of adultery. The lower court noted that it did so even though adultery was not one of the offenses listed in paragraph 148(e) *Taylor*, 64 M.J. at 418. With *Rener* and *Massey*, *supra*, the court overruled *Leach*. *Id.* at 419.

But the 1969 Manual interjected the offense of adultery into paragraph 148(e) in response to *Massey* and *Rener*. *Id.* To the lower court, in the 1980 edition of the Manual, the President rejected the common law approach and included many of the specific privileges originally proposed by the Supreme Court. *Id.* at 420. The court below asserted that although the Rule does not list specific offenses encompassed in the term "crime against the person," the Drafter's provided the following insight:

> The Rule thus recognizes society's overriding interest in the prosecution of anti-marital offenses....The Rule is similar to 1969 Manual Para 148e but has deleted the Manual's limitation of the exceptions to the privilege to matters occurring after marriage or otherwise unknown to the spouse as being inconsistent with the intent of the exceptions. *Id.* at 14.

To the court, the above passage was "strong evidence that [the President] meant to apply the exceptions to both the husband-wife testimonial privilege and the marital communications privilege. *Id.* at 420. This was insight into the scope of the exceptions, but that is not sufficient to warrant ignoring this Court's precedent. The court below also summarily dismissed this Court's precedent in *Bassett*. *Id.* at 420. The Court did so even with no language directly exempting adultery from the privilege. As this Court has held, the language of a statute "should not be adjudged as working a departure from the old and established rule, unless the language imperatively demands such construction. *Id.* at 422, Ryan, J., dissenting (citing *Bassett*, 137 U.S. at 505-06.)

The Court offered no reason to depart from this Court's precedent. The simple fact remains - the President eliminated adultery as an exception to the marital privilege. Nowhere is adultery defined in the Manual as a "crime against the person of the spouse." As Justice Ryan noted, adultery was not listed in the Drafter's Analysis addressing the M.R.E. 504(c)(2)(A) exceptions. *Id.* But adultery was listed in the 1969 Manual and "where language exists in an earlier version of a rule and is removed from a later edition of the rule, the later rule controls. *Id.* (citing *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 373 (1905). The language of the Rule cannot be stretched so far as to include adultery within the language of "crime against the

person of the spouse." *Id.* at 423, Ryan, J., dissenting. Common and approved usage of this term, as well as the overall structure of M.R.E. 504(c)(2)(A), refers to crimes of violence. *Id.* at 421, Ryan, J., dissenting.

There is no reason to ignore the language of the rule, the common law, and this Court's precedent based on conjecture or supposition as to the precise scope of the Drafters' Analysis, which is not itself a rule. *Id.* at 423, Ryan, J., dissenting. While this Court has noted that adultery is a crime which involves disloyalty to the marriage, it has expressly rejected the position that adultery was a crime that permitted an exception to the marital privilege. *Id.* at 421-22, Ryan, J., dissenting. This is still the law and the lower court erred in ignoring this Court's holding in *Bassett*.

II.

The Lower Court's Decision is Incorrect.

The lower court determined that the President's deletion of the exceptions in the 1980 Manual and this Court's holding in *Bassett* yielded to ambiguous references in the 1980 Manual for Courts-Martial to the 1969 Drafter's analysis. To say that this somehow equates to a holding that adultery as a crime against the person of the spouse is not correct in law and ignores this Court's precedent in *Bassett v. United States*. Only action by this Court will redress this inaccuracy and force the Court of Appeals for the Armed Forces to follow this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES, Appellee
v.
Jason L. TAYLOR, Sergeant
U.S. Marine Corps, Appellant

No. 06-0319
Crim. App. No. 200202366

United States Court of Appeals for the Armed Forces

Argued January 8, 2007
Decided April 5, 2007

STUCKY, J., delivered the opinion of the Court, in which EFFRON, C.J., and ERDMANN and BAKER, JJ., joined. RYAN, J., filed a dissenting opinion.

Counsel:

For Appellant: Lieutenant Brian L. Mizer, JAGC, USN (argued).

For Appellee: Captain James W. Weirick, USMC (argued); Commander P. C. LeBlanc, JAGC, USN, and Lieutenant Craig A. Poulson, JAGC, USNR (on brief); Colonel R. F. Miller, USMC, and Lieutenant Steven M. Crass, JAGC, USNR.

Military Judges: M. H. Sitler and P. H. McConnell

Judge STUCKY delivered the opinion of the Court.

We granted review to consider whether an accused may invoke the spousal confidential communications privilege and thereby prevent his wife from testifying to his admission to committing adultery. We hold that that he may not and affirm the court below.

I.

Appellant, who was then stationed at Camp Lejeune, North Carolina, married DN in August 1999. In November of that year, DN returned to Idaho to finish high school. Soon after she left, Appellant met a fifteen-year-old girl, AM. AM lived in a trailer park where Appellant visited friends.

Appellant and AM developed a romantic and sexual relationship. They engaged in sexual intercourse approximately forty times, in several locations, between November 1999 and early 2000. Throughout the affair, she knew he was married and that his wife was in Idaho. She told him she was fifteen years old.

In April 2000, DN returned from Idaho. After experiencing marital difficulties, she confronted Appellant on Christmas Day 2000. He first denied, but then confessed to his affair with AM. He told DN that he had made a mistake, but loved her and wanted to salvage their marriage.

At his special court-martial, Appellant filed a motion in limine, asserting the marital communication privilege over this conversation. The military judge denied the motion, ruling that adultery was an offense against the spouse within the meaning of Military Rule of Evidence (M.R.E.) 504(c)(2)(A) and, therefore, Appellant could not prevent his wife from testifying to the contents of the conversation.

Contrary to his pleas, the military judge convicted Appellant of one specification of carnal knowledge, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2000), and one specification of adultery, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2000). Appellant was acquitted of one specification of sodomy with a child under the age of sixteen, and one specification of sodomy. Article 125, UCMJ, 10 U.S.C. § 925 (2000). The sentence adjudged by the court-martial, and approved by the convening authority, consisted of a bad-conduct discharge, confinement for four months, forfeiture of $600 pay per month for four months, and reduction to the lowest enlisted grade. The United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *United States v. Taylor*, 62 M.J. 636 (N-M. Ct. Crim. App. 2006).

II.

M.R.E. 504 sets out the marital privileges applicable to trials by courts-martial. With respect to the privilege of

confidential communications made during the marriage, it provides as follows: "A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law." M.R.E. 504(b)(1). However, the privilege does not apply: In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse. M.R.E. 504(c)(2)(A).

Appellant asserts that adultery is not "a crime against the person or property" of his wife and that therefore, the military judge erred by permitting her to testify over his objection. The Military Rules of Evidence do not define the term "a crime against the person or property of the other spouse." Appellant implores this Court to confirm that "the proper approach to consideration of whether an offense charged against one spouse injures the other depends not upon the outrage to her sensibilities or a violation of the marital bonds, but upon some direct connection with her person or property." United States v. Massey, 15 C.M.A. 274, 282, 35 C.M.R. 246, 254 (1965). Whether adultery is "a crime against the person . . . of the other spouse" is a question of law we review de novo. See *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) (deciding whether the term "child of either" under M.R.E.504(c)(2)(A) should be construed to include a de facto child).

III.

Historically, the marital privilege involved two distinct concepts: one related to the capacity (often referred to as the competency or disability) of one spouse to testify against the other, while the other concerned confidential communications made between husband and wife during the marriage. 2 Stephen A. Saltzburg et al., Military Rules of Evidence Manual § 504.02 (6th ed. 2006). Although we are concerned with the confidential communications privilege in this case, the history of the two concepts is so intertwined as to require a discussion of both.

At common law, neither husband nor wife was competent to testify against the other. 1 Kenneth S. Broun et al., McCormick on Evidence § 66, at 318 (6th ed. 2006); 2 John Henry Wigmore, Evidence in Trials at Common Law, §§ 600-601 (Chadbourn rev. 1979).

> This spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now long abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also

inadmissible from his wife. *Trammel v. United States*, 445 U.S. 40, 44 (1980).

The spousal disqualification rule "always recognized certain exceptions founded on a supposed necessity, i.e., the presumed impossibility, in specifically defined situations, of obtaining other witnesses." 2 Wigmore, supra, § 612 (citation omitted). Such an exception to spousal disqualification was made in both the common law and American military law for cases in which the trial was for bodily injury or violence inflicted by one spouse on the other. 1 Broun et al., supra, § 66, at 319; William Winthrop, Military Law and Precedents 335 (2d ed. 1920 reprint).

In 1951, the President promulgated a new Manual for Courts-Martial to reflect the changes to military justice resulting from the enactment in 1950 of the Uniform Code of Military Justice, 10 U.S.C. §§ 800-940 (1950). Manual for Courts-Martial, United States (1951 ed.) (1951 MCM). Article 36(a), UCMJ, granted the President the authority to prescribe trial procedures, "including modes of proof, . . . which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836(a) (emphasis added).

In the 1951 Manual, the first governing all of the armed services, the President included a chapter entitled "Rules of Evidence." 1951 MCM chap. XXVII. It was more akin to a treatise than specific rules of evidence. He

adopted the following regarding the competency of spouses to testify:

> Husband and wife are competent witnesses in favor of each other. Although husband and wife are also competent witnesses against each other, the general rule is that both are entitled to a privilege prohibiting the use of one of them as a witness (sworn or unsworn) against the other. This privilege does not exist, however, when the husband or wife is the individual or one of the individuals injured by the offense with which the other spouse is charged, as in a prosecution for an assault upon one spouse by the other, for bigamy, polygamy, unlawful cohabitation, abandonment of wife or children or failure to support them, for using or transporting the wife for "white slave" or other immoral purposes, or for forgery by one spouse of the signature of the other to a writing when the writing would, if genuine, apparently operate to the prejudice of such other.

1951 MCM chap. XXVII, para. 148.e., at 277. The drafters of the Manual intended that, under this provision, the spouse of an accused could be compelled to testify "if he or she [was] the victim of the transgression with which the other spouse is charged." Charles L. Decker et al., Legal and Legislative Basis, Manual for Courts-Martial, United States 235 (1951 ed.).

On the other hand, confidential communications between husband and wife were privileged. The person entitled to the *United States v. Taylor*, privilege was the spouse who made the communication. Normally, such a communication could not be disclosed unless that spouse consented to disclosure or otherwise waived the privilege. However, the court could require the spouse of an accused to disclose the communication, at the accused's request, even if the spouse was the one who made it. 1951 MCM chap. XXVII, para.151.b.(2).

In *United States v. Leach*, 7 C.M.A. 388, 397, 22 C.M.R.178, 187 (1956), a spousal privilege case, this Court held that a wife was "injured," within the meaning of paragraph 148.e., by her husband's act of adultery. We interpreted the term "injured" to "embrace[] mental suffering arising from violations of the marital relationship." 7 C.M.A. at 397, 22 C.M.R. at 187. Although adultery was not one of the offenses listed in paragraph 148.e., we concluded that the list was merely illustrative, not exclusive. 7 C.M.A. at 397, 22 C.M.R. at 187.

Nine years later, we had another opportunity to determine the scope of the exception to the marital privilege. In *Massey*, the accused was charged with carnal knowledge of his own daughter. Over the accused's objection, his wife was permitted to testify to the victim's complaints about the abuse. 15 C.M.A. at 275-77, 35 C.M.R. at 247-49. After noting that the accused had not been charged with adultery, we indicated that "the proper approach to consideration of

whether an offense charged against one spouse injures the other depends not upon the outrage to her sensibilities or a violation of the marital bonds, but upon some direct connection with her person or property." 15 C.M.A. at 282, 35 C.M.R. at 254. We then held that:

> the offense of carnal knowledge, even when incestuous, is not a direct injury to a spouse, which causes her testimony to fall without the accused's properly invoked privilege. In order to justify elimination of that shield to the marital union, there must be something more than conduct which abuses its privileges and responsibilities; there must be some direct, palpable invasion of, or injury to, the interests of the witness. 15 C.M.A. at 282-83, 35 C.M.R. at 254-55.

In *United States v. Rener*, consistent with our holding in *Massey*, we overruled Leach and held that adultery is not an injury to the person or property of the spouse, but merely a "'violation of the marital bonds.'" 17 C.M.A. 65, 68, 37 C.M.R. 329, 332 (1967) (quoting Massey, 15 C.M.A. at 282, 35 C.M.R. at 254).

The President issued a new Manual in 1969. Manual for Courts-Martial, United States (1969 rev. ed.). The 1969 Manual retained the "treatise" approach of the previous Manual with regard to evidentiary matters. In paragraph 148.e., "adultery" and "mistreatment of a child of the other spouse" were added as offenses to which the spousal privilege against testifying did not apply. These

additions were in direct response to this Court's holdings in *Massey* and *Rener*. Dep't of the Army, Pamphlet 27-2 Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition at 27-32 (1970). The drafters explained the need to depart from the holdings in *Massey* and *Rener*. The effect of *Massey*:

> is not compatible with the needs of the military service, in which, especially overseas, large groups of military personnel and their dependents live in closely knit communities. In these communities and generally in military life, child beating and child molestation by parents cannot be tolerated and certainly should not be facilitated by a rule of evidence prescribed in the Manual. *Id.*

Rener was not followed because "the wife is injured by [adultery and unlawful cohabitation] which are obviously directly deleterious to the martial [sic] relationship." *Id.*

During the early 1970s, the Supreme Court approved and sent the Federal Rules of Evidence to Congress for adoption. 1 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual pt. 1, at 4 (9th ed. 2006). The proposed rules contained nine privileges and four rules for controlling the use of those privileges. Because significant controversy arose over these, Congress instead opted for a single rule that mandated a common law approach to privileges. 2 Saltzburg et al., Military Rules of Evidence Manual, supra, § 501.02[2]. The

Federal Rules, as amended, were signed into law on January 2, 1975. Pub. L. No. 93-595, 88 Stat. 1926 (1975); 1 Saltzburg et al., Federal Rules of Evidence Manual, supra, pt. 1, at 4-5.

A little more than three months later, this Court was asked, in the case of an accused convicted of committing sexual offenses on his own child, whether the *Massey* holding was still valid in light of the President's changes in the 1969 Manual. We determined that *Massey* "was no longer viable." *United States v. Menchaca*, 23 C.M.A. 67, 68, 48 C.M.R. 538, 539 (1974). We acknowledged that differences between the military and federal rules of evidence are allowable, that the change to paragraph 148.e. to add "mistreatment of a child" as an injury to the spouse was consistent with the rules of evidence for use in federal district courts that the Supreme Court had proposed to Congress, and that the change expressed the specific intent of the drafters to overrule Massey. 23 C.M.A. at 69, 48 C.M.R. at 540.

In 1980, the President adapted the Federal Rules to military practice in the Military Rules of Evidence. 1 Saltzburg et al., Military Rules of Evidence, supra, at xv. Rather than take the common law approach to privileges approved by Congress, the Military Rules included many of the specific privileges originally proposed by the Supreme Court. The President took this approach because of the military justice system's "dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more

stability than civilian law." 2 Saltzburg et al., Military Rules of Evidence, *supra*, § 501.03 (Drafters' Analysis).

M.R.E. 504 combined into one rule the husband-wife and the confidential marital communications privileges. For the first time, it made the exceptions to the husband-wife privilege applicable as well to the marital communications privilege. Thus, there is no marital confidential communications privilege

"[i]n proceedings in which one spouse is charged with a crime against the person or property of the other." M.R.E. 504(c)(2)(A). Although the Rule does not list specific offenses encompassed in the term "crime against the person," the drafters provided some insight into the scope of the exceptions:

> The Rule thus recognizes society's overriding interest in the prosecution of anti-marital offenses . . . .The Rule is similar to 1969 Manual Para. 148 e but has deleted the Manual's limitation of the exceptions to the privilege to matters occurring after marriage or otherwise unknown to the spouse as being inconsistent with the intent of the exceptions.

Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence app. 22 at A22-40 (2005 ed.) [hereinafter Drafters' Analysis].

In her scholarly dissent, Judge Ryan maintains that the language of the Rule itself, the deletion of the term

"adultery" from the Rule as it appeared in the 1969 Manual, and the common law and Supreme Court interpretations of the marital communications privilege all support a conclusion that adultery is not a "crime against the person or property" of the spouse. We are certainly not unsympathetic to the view that in construing the language of a rule, "it is generally understood that the words should be given their common and approved usage." *McCollum*, 58 M.J. at 340 (citation and quotation marks omitted).

But, there is no evidence that, in adopting M.R.E. 504(c)(2)(A), the President meant to amend, let alone jettison, those exceptions to the privilege listed in paragraph 148.e. of the 1969 Manual. Rather, the Drafters' Analysis is strong evidence that he meant to apply the exceptions to both the husband-wife testimonial privilege and the marital communications privilege. Moreover, this reading of the Rule is consistent with the principle that testimonial privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Trammel*, 445 U.S. at 50-51 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). We therefore hold that, for the purposes of M.R.E. 504(c)(2)(A), adultery is a crime against the person of the other spouse. The military judge was correct in denying Appellant's motion in limine to assert the privilege against his wife's testimony.

IV.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Ryan, Judge (dissenting):

I do not question that adultery is an anti-marital offense. This conclusion is intuitive and a matter of common sense. But that premise does not answer the question whether adultery is a "crime against the person or property of the other spouse," the actual exception to the husband-wife privilege contained in Military Rule of Evidence (M.R.E.) 504(c)(2)(A), which is at issue here.

M.R.E. 504 and the exceptions thereto reflect the policy judgments of the President regarding those communications between a husband and wife that are privileged -- and as to those communications that will be exempted from that privilege. See *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2000) (determining whether an exception to a privilege should apply "is a legal policy question best addressed by the political and policy-making elements of the government"). Our duty is to interpret and to apply the law as written in the language of the rule itself.

In this case, an inquiry into the scope of the M.R.E. 504(c)(2)(A) privilege exception must, therefore, focus on the meaning of the words "crime against the person or property of the other spouse." A crime "against the person . . . of the spouse," is not defined in either the Manual for Courts-Martial, United States (2005 ed.)

(MCM) or the Military Rules of Evidence. "In construing the language of a statute or rule, it is generally understood that the words should be given their common and approved usage." *McCollum*, 58 M.J. at 340 (quotation marks omitted).

It is not in accordance with the common or approved usage of the language "crime[s] against the person of the other spouse" to include within that phrase every act that might emotionally harm, offend, or betray. Such a broad construction that includes these acts would impermissibly render the limiting words "person or property of the other spouse" superfluous. See *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . ." (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

In my view, the common and approved usage of "crimes against the person of the other spouse" here refers to crimes of violence against that spouse. This definition reflects and is consistent with the overall structure of M.R.E. 504(c)(2)(A), which makes repeated references to "crimes against the person." See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) ("we adopt the premise that [a] term should be construed, if possible, to give it a consistent meaning throughout").

More importantly, this construction is in accord with the long-standing recognition in criminal law that crimes "against the person" refer to offenses of violence against a person. See, e.g., 2 Wayne R. LaFave, Substantive Criminal Law §§ 14-17 (2d ed. 2003) (discussing

offenses against the person); 1 William O. Russell & Charles S. Greaves, A Treatise on Crimes and Misdemeanors 481-782 (1845) (discussing "offenses against the persons of individuals"); see also *Keeble v. United States*, 412 U.S. 205, 206 (1973) (including murder, manslaughter, rape, and assault with intent to kill among "crimes against the person"); *Relford v. Commandant, United States Disciplinary Barracks, Ft. Leavenworth*, 401 U.S. 355, 369 (1971) (equating an offense violative of the physical security of a person, such as the rapes and kidnapping at issue in the case, with a "crime against the person of the individual").

This definition of "crime[s] against the person of the other spouse" is also consistent with the common law view of the exception to the husband-wife privilege. See, e.g., M.R.E. 101 (reaffirming the congressional mandate in Article 36(a) Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836(a) (2000)). In *Bassett v. United States*, the Supreme Court examined whether a statutory exception to the privilege "for a crime committed by one against the other" was available in a case involving polygamy. 137 U.S. 496, 503-06 (1890) (analyzing a federal statute applicable to the Utah Territory).

The Supreme Court reaffirmed the common law rule that "the wife is not competent [as a witness against her spouse], except in the cases of violence upon her person." Bassett, 137 U.S. at 505 (quoting *Stein v. Bowman*, 38 U.S. 209, 222 (1839)). The Supreme Court recognized a spouse's "humiliation and outrage" caused by the polygamy or adultery of the other spouse, and that

those offenses may be "crimes which involve disloyalty to the marital relation." *Bassett*, 137 U.S. at 506. Nonetheless, the Court, while ceding the anti-marital nature of such offenses, expressly rejected the notion that either polygamy or adultery was a crime that permitted an exception to the marital privilege.[1] *Id.*

The Supreme Court's conclusion that the statutory exception to the marital privilege was not available in the case of adultery or bigamy is compelling. More telling, for purposes of this case, is the Supreme Court's determination that while a legislature can change the parameters of the "ancient" marital privilege via statute, the language of a statute "should not be adjudged as working a departure from the old and established rule, unless the language imperatively demands such construction." *Id.* at 505-06 (emphasis added). The language of M.R.E. 504(c)(2)(A) does not demand the construction employed by the majority.

This Court should follow the decision and reasoning of the Supreme Court in *Bassett*, which has not been overruled. We have no language "imperatively demanding" exemption from the husbandwife privilege. And we have a problematic and checkered history in both the former MCMs and the conflicting judicial decisions from this Court on the precise question at issue in this case. __ M.J.__ (6-12).

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[1] The statutory exception to the privilege examined in Bassett facially gives greater traction to the majority's analysis in this case than the language of the privilege actually before us.

Illustrative of this point is the fact that the MCM – with the evidentiary rule we apply in the present case -- does not specifically list the crime of adultery as an exception to the long-standing husband-wife privilege. But it does specifically list other anti-marital offenses. M.R.E. 504(c)(2)(C).

Also, the 1969 MCM specifically listed adultery as such an exception. MCM para. 148.e (1969 rev. ed.) (para. 148.e was omitted by change 3, Sept. 1, 1980). Ordinarily, where language exists in an earlier version of a rule and is removed from a later edition of the rule, the later rule controls. See e.g., *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 373 (1905) ("[I]t cannot in reason be said that the omission . . . gives rise to the implication that it was the intention of Congress to reenact it."). I find the deletion of any reference to the offense of adultery in the present M.R.E. 504(c)(2)(A) exception problematic for the position of the majority.

Nor is adultery specifically listed in the Drafters' Analysis addressing the M.R.E. 504(c)(2)(A) exception. Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence app. 22 at A22-40 (2005 ed.) [hereinafter Drafters' Analysis]. The absence of adultery as a listed exception in either the present MCM or the Drafters' Analysis cannot be ignored.

The Drafters' Analysis does reference anti-marital offenses:

> This provision is taken from proposed Federal Rule 505(c)(1) and reflects in part

> the Supreme Court's decision in *Wyatt v. United States*, 362 U.S. 525 (1960). The Rule thus recognized society's overriding interest in prosecution of anti-marital offenses . . . . The Rule is similar to 1969 Manual Para. 148 e . . . ."

Drafters' Analysis at A22-40 (emphasis added) (citation omitted). *Wyatt v. United States* dealt with a specific antimarital offense -- violations of the Mann Act, 18 U.S.C. § 2421 (2000). *Wyatt*, 362 U.S at. 525. Violations of this statute and similar offenses were reflected as exceptions to the husbandwife privilege by the President in their own specific exception: M.R.E. 504(c)(2)(C). These observations are a source of concern to me independent of the important point that the Drafters'Analysis, when it does not corroborate the plain language of the rule, is of questionable precedential weight.

Whatever the best policy may be, and however useful admissions such as the one in this case would be to prove the offense of adultery, the present language of the M.R.E. 504(c)(2)(A) cannot stretch so far as to include adultery within the language of "crime against the person of the spouse." This determination is supported not only by the language of the rule itself, but by both the common law and Supreme Court precedent. There is no reason to ignore these authorities based on conjecture or supposition as to the precise scope of the Drafters' Analysis, which is not itself a rule.

Given that I dissent from the majority's ruling and hold

that the lower court erred, the question remains whether the error was harmless. After examining the record, I cannot say that the testimony of Appellant's wife did not have a substantial influence on the military judge. *See Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946).

This case involved the charged offense of adultery and carnal knowledge. Appellant denied that he had a sexual relationship with AM. AM testified that Appellant did have a sexual relationship with her. The decisional crux was whether Appellant or the alleged object of his infidelity was truthful, a question that could have been resolved either way. The testimony of Appellant's wife, T, that Appellant admitted his adultery to her, may well have tipped the balance against Appellant on this key issue. *See Hawkins v. United States*, 358 U.S. 74, 79 (1958) (concluding that "after examining the record we cannot say that [wife's inadmissible privileged] testimony did not have substantial influence on the jury"). I respectfully dissent.

Appendix B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER D.A. WAGNER J.F. FELTHAM

UNITED STATES

v.

Jason L. TAYLOR
Sergeant (E-5), U.S. Marine Corps

PUBLISH

NMCCA 200202366 Decided 18 January 2006

Sentence adjudged 14 December 2001. Military Judge: P.H. McConnell. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Combat Engineer Battalion, 2d Marine Division, Camp Lejeune, NC.

LT J.L. GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate

Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, contrary to his pleas, of carnal knowledge and adultery with the same individual, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 4 months, forfeiture of $600.00 pay per month for 4 months, and reduction to pay grade E-1.

After considering the record of trial, the appellant's sole assignment of error that the military judge erred in ruling that the marital privilege did not apply, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant was convicted of both carnal knowledge and adultery on divers occasions with AM, a 15-year-old female. AM testified that she and the appellant first met at her trailer park in 1999 while the appellant was visiting her neighbors, Mr. and Mrs. W. AM testified that she and the appellant engaged in sexual intercourse some 40 times from November 1999 until early 2000, in various locations including his car,

Mr. and Mrs. W's trailer home, a hotel, and her mother's trailer home. AM testified that, throughout the relationship, she knew the appellant was married and that his wife was in Idaho and that she told the appellant she was only 15 years old.

AM's mother testified that she worked long hours and did not know about the affair while it was ongoing. She testified that she knew and liked the appellant and treated him like a son. But in late 1999, she noticed that her daughter was developing feelings for the appellant. At that time, according to her testimony, AM's mother counseled the appellant that her daughter was enamored of him and because he was married and her daughter was underage, he should not be hanging around her every day. She also testified that she told the appellant she would "nail his butt to the wall" if he ever touched her daughter. Record at 157. Nonetheless, according to the testimony of AM, the relationship continued until shortly before the appellant's wife returned from Idaho in April 2000.

The appellant's wife testified that she went back home to Idaho in August 1999 to finish high school and to wait for the appellant's assignment to base quarters at Camp Lejeune, North Carolina. She testified that she returned to Camp Lejeune in April 2000 after her husband was assigned to quarters. According to her testimony, she and the appellant talked on the phone nearly every day during her absence. The appellant's wife testified that, shortly after her return to Camp Lejeune, she and the appellant began experiencing marital problems, during which she confronted him

about AM.

The military judge denied a defense motion in limine based on marital privilege to prevent the appellant's wife from testifying regarding the details of this conversation. The appellant's wife was permitted to testify that the appellant initially said that he and AM were just friends, but that he eventually admitted to her that he and AM had sexual intercourse on numerous occasions during a period of 6 or 7 months while his wife was in Idaho.

The appellant's wife further testified that several months after her husband's admission, she approached AM's mother about the affair. AM's mother testified that she then broached the subject with AM, who admitted the relationship.

The appellant testified that he and AM were only friends and that he never had sex with her. He also testified that, when his wife confronted him about AM, he repeatedly denied the accusations. The defense presented evidence of the appellant's character for truthfulness and good general and military character.

Applicable Law

MILITARY RULE OF EVIDENCE 504(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) provides that:

> [a] person has a privilege during and after the marital relationship to refuse to

> disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

Both parties orally stipulated at trial that the appellant's admission to his wife was a private, confidential communication not intended to be disclosed to third parties. Record at 51. However, the parties differ as to the applicability of the following exception: "There is no privilege . . . [i]n proceedings in which one spouse is charged with a crime against the person or property of the other spouse..." MIL. R. EVID. 504(c)(2). The Analysis of the Military Rules of Evidence, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), App. 22, at A22-40, discusses the exception as follows:

> Rule 504(c)(2) prohibits application of the spousal privilege, . . . when the circumstances specified in paragraph (2) are applicable. Subparagraphs (A) and (C) deal with anti-marital acts, *e.g.*, acts which are against the spouse and thus the marriage.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000); *see United States v. Westmoreland*,

312 F.3d 302, 306 (7th Cir. 2002)("We review the trial court's resolution of a marital privilege issue for an abuse of discretion."). Whether a communication is privileged is a mixed question of fact and law. *McElhaney*, 54 M.J. at 132 (citing *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997)). We review a lower court's legal conclusions *de novo*, but we give a lower court's factual findings more deference, and will not reverse such findings unless they are clearly erroneous. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). *United States v. McCollum*, 58 M.J. 323, 335-36 (C.A.A.F. 2003).

Discussion

The sole question before us is whether adultery is a crime "against the person or property" of the other spouse. MIL. R. EVID. 504(c)(2)(a). If it is, the admissions made by the appellant to his wife are admissible as an exception to the marital privilege. If not, the military judge should have excluded that testimony as a privileged communication. We conclude that the military judge ruled correctly when he denied the appellant's motion in limine to suppress his admissions to his wife.

We find no military cases directly on point. The appellant relies primarily on the case of *United States v. Rener*, 37 C.M.R. 329 (C.M.A. 1967) which interpreted the 1951 Manual for Courts-Martial provision regarding marital privilege held that:

> the proper approach to consideration of

> whether an offense charged against one spouse injures the other *depends not upon the outrage to her sensibilities or a violation of the marital bonds, but upon some direct connection with her person or property*. Almost any crime by one of the spouses can be said to affect the nature and status of the regard of the parties to the marriage one for the other. But if the exception to the privilege is not limited to a direct invasion of the wife's rights, the rule will soon be judicially eliminated.
>
> Indeed, we had previously held that even where the wife was the recipient of physical abuse, that is, the *victim* in a charge of four specifications of assault and battery, the privilege could be invoked and she could not be compelled, over her objection, to testify against her husband.

Rener, 37 C.M.R. at 332 (internal citations omitted).

The marital privilege rule, however, was subsequently changed specifically to overrule both *Rener* and *United States v. Massey*, 35 C.M.R. 246 (C.M.A. 1965). *See United States v. Menchaca*, 48 C.M.R. 538, 539-40 (C.M.A. 1974). We note, however, that both *Massey* and *Menchaca* dealt with the child abuse exception to the marital privilege rule and are not dispositive as to whether adultery is also considered a crime against the person or property of the other spouse.

As noted above, the current spouse exception to the marital privilege rule, MIL. R. EVID. 504(c)(2), occurs when the appellant is charged with an offense "against the person or property" of the other spouse, whereas the exception that was effective when *Rener* was decided applied when the spouse was "injured" by the offense with which the appellant was charged. We find no military cases after *Rener* or after the change in the Manual regarding this exception to the marital privilege rule.

The Federal Rules of Evidence do not specifically include any privileges. Instead, in criminal cases, the privilege of a witness "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501.

We did find several Federal and state cases that support the notion that adultery is an exception to the marital privilege rule. In an old case, the Supreme Court opined: "Adultery is an offense against the marriage relation and belongs to the class of subjects which each State controls in its own way." *Southern Surety Co. v. Oklahoma,* 241 U.S. 582, 586 (1916)(holding that bail bond action does not make interpretation of priviledge).

"The modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship." *Trammel v. United States,* 445 U.S. 40, 44 (1980)(ending rule of spousal priviledge that does not involve confidential marital communications). "By

abandonment of the marital duties and privileges, such a husband has also abandoned any right to assert [the marital] privilege...." *United States v. Ryno,* 130 F.Supp. 685, 688 (S.D. Cal. 1955).

The Arizona Supreme Court noted that, under Arizona law, "either spouse may . . . be examined as a witness for or against the other in a prosecution for bigamy or adultery, committed by either spouse...." *State v. Whitaker,* 544 P.2d 219, 222 (Ariz. 1975)(quoting Ariz.Rev.Stat. §13-1802(1)(1975)). The Court of Criminal Appeals of Oklahoma opined that the exception to the privilege occurs when the offense impairs the conjugal relation:

> The rule that the injury must amount to a physical wrong upon the person is too narrow; and the rule that any offense remotely or indirectly affecting domestic harmony comes within the exception is too broad. The better rule is that, when an offense directly attacks or directly and vitally impairs the conjugal relation, it comes within the exception to the statute that one shall not be a witness against the other except in a criminal prosecution for a crime committed one against the other.

Cargill v. State, 220 P. 64,67 (Okla.Crim.App. 1923).

In the absence of direct case law on whether adultery is an offense against the spouse, we must interpret the current language in the Manual in light of

the regulation, the case law, and our reason and experience. We are mindful that adultery requires, as an element, that the Government prove beyond a reasonable doubt that the misconduct is either prejudicial to good order and discipline or service-discrediting. But this terminal element does not assist us in determining whether the offense is also a crime "against" the spouse. All offenses specified in the Manual as Article 134(1) and (2) offenses require this element, but many of those offenses are nonetheless also offenses "against" a victim.

As this court recently noted in *United States v. Orellana*, ___ M.J. ___, 2005 CCA LEXIS 367, No. 200201634 (N.M.Ct.Crim.App. 29 Nov 2005), while the primary purpose of the adultery statute under Article 134, UCMJ, is to maintain good order and discipline within the service, it does "secondarily" foster "the fundamental social institution of marriage." *Id.*, slip op. at 5. Adultery strikes directly at the institution of marriage. It often results in significant disruption to the lives of the two married persons and any children of the marriage. Further, we cannot ignore the many records of trial that we have reviewed which involve various crimes, including domestic violence, directly arising out of infidelity by one of the spouses. We are compelled to hold that adultery is a crime against the person of the other spouse. Thus, we hold that when one spouse is charged with adultery, the marital privilege does not apply to communications involving the adultery.

Assuming, *arguendo*, that the military judge erred when he allowed the appellant's wife to testify as

to his admissions, we nonetheless deny relief. As noted above, the evidence of guilt was strong and compelling. Even without evidence of the admissions to his wife, the appellant's guilt was established beyond a reasonable doubt to our satisfaction through the testimony of AM and the corroborating testimony from AM's mother and the appellant's wife. We further find incredible the testimony of the appellant. Thus, if the military judge erred, we conclude that the error did not materially prejudice any substantial right of the appellant.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge WAGNER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix C

Rule 504. Husband-wife privilege

(a) *Spousal incapacity.* A person has a privilege to refuse to testify against his or her spouse.

(b) *Confidential communication made during marriage.*

(1) *General rule of privilege.* A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) *Definition.* A communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

(3) *Who may claim the privilege.* The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) *Exceptions.*

(1) *Spousal incapacity only.* There is no privilege under subdivision (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against

the other party, the parties are divorced or the marriage has been annulled.

(2) *Spousal incapacity and confidential communications.* There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication; or

(C) In proceedings in which a spouse is charged, in accordance with Article 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328; with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421–2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

privilege may not be claimed in the trial of criminal cases in the Unitec States district courts.